No. 22,715

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

TERRY COACH INDUSTRIES, INC.,

Respondent.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

Jurisdiction.

Respondent accepts Petitioner's jurisdictional statement.

Statement of the Case.

A. The Background of the Strike.[1]

On the afternoon of May 3, 1966, certain of the employees of Terry Coach Industries, Inc. (hereinafter "Terry") went out on a spontaneous strike, basically over the issue of wages. There were no prior negotiations nor any prior union organizational efforts [R. 11; Tr. 136]. The strike lasted until May 10, 1966 [R. 11; Tr. 24].

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[1]References to the pleadings, decision and order of the Board, and other papers reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

The Company had information concerning misconduct of many strikers, but based on the degree of misconduct refused to rehire only six persons named in Exhibit "A", of which the complainant Willis Smith (hereinafter "Smith") was one [Tr. 105-107].

B. Background of the Complainant Smith.

Smith was a leadman in the Metal Department [R. 10; Tr. 6], leading from twenty-five to thirty-five employees [Tr. 9]. As such, he was paid a thirty-cent an hour premium [Tr. 33]. As leadman, Smith had spoken regularly with the Production Manager, Charles Brewster (hereinafter "Brewster") many times on personnel matters involving his department, in the same manner as all of the other leadmen in the plant [Tr. 7 and 32], but by his own statement was not in any way prominent as a spokesman. There is some question whether he spoke to Brewster on the day of the strike [Tr. 7 and 98], but in any event at least one other leadman, who was rehired, did the same thing [Tr. 9 and 111].

C. No Evidence of Company Antiunion Animus.

The Company was not charged with, nor is there an iota of evidence of Company antiunion animus. There is absolutely no evidence that the Company discriminated against persons who acted as spokesmen for the employees. In fact, it affirmatively appears that the employer did reinstate persons who acted much more prominently as spokesmen for the employees, in particular Bob Vincent [Tr. 98-99, lines 23-11].

D. Misconduct Proven to the Satisfaction of the Trial Examiner.

The Trial Examiner found that the complainant, Willis Smith, engaged in the following misconduct:

1. He threatened the lunch wagon driver with physical harm if he returned to the plant and called him an obscene name, "chicken shit" [R. 12, lines 27-40].

2. He called a subordinate Rakow a "bastard" for crossing the picket line [R. 15].

3. He blocked a vendor truck access to the plant [R. 15, lines 35-39].

E. Misconduct Not Found by the Trial Examiner but Conclusively Shown in the Record.[2]

In addition to the misconduct found by the Trial Examiner, the record contains conclusive evidence of the following additional incidents of misconduct.

1. *Threats to Rakow.* Arthur Rakow was an employee in the department of which Smith was the leadman [Tr. 65, lines 12-13]. Rakow had gone out on strike the first day, May 3 [R. 13; Tr. 55]. However, he returned to work on Wednesday, May 4. When he came out of work, he found that one tire of his car had been slashed, and the other punctured [R. 13; Tr. 55-56]. While he was working on his tires, Smith and another striker who was not reinstated, Tony Jovee. approached him. Smith called him a "bastard and a son-

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[2]The brief for Petitioner states that the Trial Examiner made "a careful analysis" of the testimony (Brief, p. 7, footnote 6). The evidence quoted in the text above will show just how "careful" this analysis was.

of-a-bitch," and Smith threatened to get him unless he went out on strike [Tr. 56, 68-70]. The Trial Examiner's reasons for refusing to credit the testimony of Rakow are:

(a) "Rakow's conflicting testimony as to whether Smith called him names on May 4" [R. 14, lines 1-2]. The Trial Examiner cited no conflicts, and Respondent can find no conflict on this point whatsoever. One cannot point out "where it does not say that in the record," but Rakow's testimony can be read [Tr. 56-57; 67-70].

(b) "[Smith's] frequent use of the passive tense without naming Smith" [R. 14, lines 2-3]. Rakow did sometimes use the passive tense, but his meaning was never unclear. See, *e.g.:*

"A. I was called such as a bastard and a son of of a bitch, and I had better walk out on the strike or they were going to get me.

Q. Who made these remarks?

A. Some were made by Willis Smith, and some were made by Tony, and a few other people that had walked up.

Q. Which ones were made by Willis Smith?

A. He said they would finally wind up getting me, if I didn't walk out on the strike." [Tr. 56-57, lines 23-6].

"Q. Was anything said as you passed through the line?

A. I heard one voice hollered I was a bastard.

Q. Did you recognize who made that remark?

A. Willis Smith." [Tr. 58, lines 10-13].

"Q. And you heard Willis Smith say, 'I am going to get you, you son of a bitch,' or what did you hear him say?

A. I was sworn at.

Q. Were you looking at Willis Smith when you were sworn at?

A. No, but I recognized his voice." [Tr. 64, lines 16-20].

The Trial Examiner's rejection of the testimony of Rakow on the grounds that he "tended to use the passive tense" amounts to friviolity. The Trial Examiner himself stated that the language of industrial relations is not necessarily the language of "polite society." [R. 17, lines 46-47]. However, he apparently expects a production employee to be aware of the prejudices of creative writing instructors against use of the passive tense. There never was any question as to whom Rakow was indentifying.

In addition, the Trial Examiner disregarded the threat because "the record does not establish that Rakow told any representative of Respondent about the incident prior to the refusal to reinstate Smith." [R. 14, lines 7-8]. The record could not be clearer to the contrary. Brewster made the decision not to reinstate Smith. His testimony was as follows:

"Q. Now, we have heard testimony this morning that Willis Smith threatened a lunch wagon driver, threatened Art Rakow, blocked nonstriking employees from entering the plant. Were you aware of these incidents at the time you made the decision to not employ Willis Smith?

A. Yes, I was." [Tr. 105-106, lines 25-5].

2. *Obscene Names to Female Employees.* At the end of the work shift on the first full day of the strike, Production Manager Brewster was standing in front of the plant about 6 to 12 feet from Smith [Tr. 100, lines 9-11; 115, lines 7-9]. Smith, within three feet of several female employees called them "broad asses" and "bitches" in various combinations of language [Tr. 100, lines 22-24; 114-115, lines 20-3].

Brewster's testimony as to the language used was absolutely positive, as was his identification of Smith. The reasons given by the Trial Examiner for refusal to credit Brewster's testimony are as follows:

> (a) "It seems unlikely that Smith would make insulting remarks to female employees in the presence of Sheriff's Deputies" [R. 13, lines 29-30]. First, this is factually incorrect. This incident took place at the mouth of the alley [Tr. 100, lines 4-8] while the deputies were at the gate [Tr. 113, lines 10-11] which is about 50 to 60 feet away [Tr. 41, lines 9-10]. Second, this constitutes pure speculation and in fact the Trial Examiner found that Smith called a fellow striker "bastard" on an occasion when the Sheriff's Deputies were present, i.e., when Smith was engaged in blocking access to the plant [R. 14, lines 33-35; R. 15, lines 17-19]. Third, on whether it is likely Smith used this language, the Trial Examiner found he used equally obscene language earlier in the day to the lunch wagon driver [R. 12, lines 26-31].
>
> (b) "Brewster evidenced some unreliability in his testimony regarding his recognition of the employee standing beside Smith" [R. 13, lines 31-32].

The Trial Examiner does not explain in any way why the fact that Brewster could not identify another person who was not facing him proved that he could not recognize Smith who was standing only six feet from him in profile. Brewster knew Smith well, was his immediate superior, and had numerous conversations with Smith. There is absolutely no basis in the record to doubt his identification of Smith [Tr. 101, lines 4-10]. As to the employee standing next to Smith, Brewster merely testified that he could not see the face of the other individual and that in any event he was engaged in watching Smith at the time [Tr. 113, lines 18-25].

(c) Brewster's testimony "was not corroborated by the employees to whom it [the obscene remark] was allegedly addressed" [R. 13, lines 33-34]. As to this argument, it should be noted, first of all, the Trial Examiner has been completely inconsistent in that he has repeatedly accepted the testimony of the complainant without corroboration, though by the complainant's own admission such corroboration was available. As to the only issue on which the complainant chose to present corroboration, the Trial Examiner found against the complainant. But more important, as is made clear in probably the leading book on evidence, *"credibility does not depend on numbers of witnesses."*[3] To require the employer to summon every witness to an incident on pain of losing on the issue of credibility will only go to infinitely stretch out the time involved in the hearing of these matters. Further,

[3]Wigmore, *Evidence,* § 2034 (3d ed. 1940).

in this case, to add to the undesirability of compelling one member of the work force unnecessarily to testify against another, it would require women employees to give extremely embarrassing testimony. Corroboration was not necessary. The testimony of the Company witness Brewster, was absolutely certain.

3. *Blocking of Nonstriking Employees' Access to the Plant.* Another incident which the Trial Examiner refused to credit involved blocking by Smith and other striking employees of access to the Company parking lot. Access to the parking lot is obtained by a long, narrow alley approximately 10 feet wide. On the south side of the alley, the Terry Coach office building is immediately adjacent to the alley. The other side of the alley is relatively open, blocked at points by poles, but is the property of the neighboring plant [Tr. 37-38, 49-51].

Assistant Production Manager, Wayne George, supervised Smith and knew him well. George testified that on the morning of May 5, Smith and six to eight other strikers were massed in this ten-foot wide alley [Tr. 38, 43-44], completely blocking it [Tr. 42-43]. It was necessary to ask the police to clear the way [Tr. 46, lines 10-16]. Specifically, one employee was able to obtain access to the plant only by literally forcing his way through the picket line, and another was forced to drive his car over the property of the adjacent landowner [Tr. 38, 58]. In the course of this blocking, Smith called non-strikers Rakow and Pearl a "bastard" and a "son of a bitch" and threatened them [Tr. 39, 51]. The testimony of George was corroborated fully

by Rakow [Tr. 57-58, 59-66]. Smith admitted being present at the plant on this morning and even seeing Pearl come into work but denied blocking [Tr. 139-140]. Smith said "A lot of times I would walk back and forth across the entrance, real slow like" [Tr. 28, lines 5-6].

The Trial Examiner refused to find Smith guilty of this misconduct due to lack of credibility of the principal witness, George [R. 15, lines 7-14]. The Trial Examiner concluded that George's testimony was unreliable first because while George testified that the pickets blocked the alley, he also admitted that they would finally move when cars forced their way through [R. 15, lines 6-8]. There is nothing conflicting in this testimony. As discussed below, the cases hold blocking is established even though ultimately access is obtained.

The Trial Examiner further discredited George's testimony because George apparently misspoke and identified Rakow as the non-striking employee forced to trespass on neighboring land on one occasion [R. 15, lines 8-10; Tr. 38, lines 19-20], but identified the person involved as Pearl later on [Tr. 48, lines 22-25]. This single discrepancy as a basis for discrediting testimony is ridiculous in that the record clearly shows that the identity of the persons involved was merely stated in passing, was not considered important, and was not in any way made the subject of further examination or cross-examination by counsel to clarify the identity of the non-strikers involved [see *e.g.,* Tr. 38, lines 19-20; 48-49; lines 22-6; 50, lines 18-19; and 51, lines 19-22].

4. *Attempts to Pick Fights.* Although Brewster testified unequivocally that Smith cursed and invited nonstriking employees to come out and fight [Tr. 102, 118, 120, 124 and 127], and Smith himself admitted that he "hollered in there a few times for some of them to come on out and join us, but not to fight" [Tr. 27, lines 20-24], the Trial Examiner refused to find any misconduct on the part of Smith because the name of the specific employees threatened was not given and Rakow did not corroborate Brewster's testimony. To hold that the threats were not proven because the name of specific employees was not given indicates complete misunderstanding of the testimony. Brewster testified that these threats were made to the work force in general [Tr. 102-103, lines 1-1; 127, lines 8-15].

5. *Lack of Corroboration.* A significant hiatus in the record should be noted. With the exception of the coffee truck incident, as to which Smith produced as a witness his half-brother, Smith did not produce a single corroborating witness, though he testified that at no time was he on the picket line alone, and therefore without benefit of a witness [Tr. 34]. It should be noted that the Trial Examiner did not believe the corroborating witness who was called.

ARGUMENT.

The ultimate issue in this cause is whether there is substantial evidence in the record viewed as a whole to support the decision of the Labor Board that Smith was entitled to reinstatement. A preliminary determination, however, must be made of exactly what misconduct he engaged in. The Board found that he:

1. Threatened a lunch wagon driver and called him obscene names;
2. Called a subordinate an obscene name; and
3. Blocked a vendor's truck.

Respondent has pointed out that the record conclusively showed the following additional acts:

1. Threatening a subordinate;
2. Calling female clerical employees obscene names;
3. Blocking employee access to the plant; and
4. Threatening and attempting to pick fights.

Petitioner attempts to airily dismiss the latter incidents in a footnote on the grounds that they involved credibility and the demeanor of the witnesses and that this determination is peculiarly within the discretion of the Trial Examiner. The Labor Board's own decisions refute this argument. The Trial Examiner here at no point relied on demeanor as a reason for crediting or discrediting testimony, but rather cited (albeit incorrectly) objective evidence in the record. Under these circumstances, the Labor Board itself attaches no significance to the finding of the Trial Examiner. In *Poinsett Lumber and Manufacturing Company*, (1964) 147 N.L.R.B. 1197, 1198, the Board stated that the policy behind attaching great weight to the Trial Ex-

aminer's determination of credibility is that "by virtue of his direct observation of witnesses at the hearing [the Trial Examiner] has the opportunity to observe and evaluate factors of appearance and demeanor of witnesses." However, the Board went on to state that "therefore, insofar as credibility findings are based upon factors other than demeanor, in consonance with the policy set forth in *Standard Dry Wall Products, Inc.,* the Board will proceed with an independent evaluation."

Similarly, in *R. & R. Screen Engraving, Inc.,* (1965) 151 N.L.R.B. 1579, 1582, fn. 7 the Board stated "where, as here, it is clear that the Trial Examiner's credibility finding is based on a statement of record rather than on the demeanor of witnesses, the Board deems itself equally competent to resolve questions of credibility."

As to the function of Courts of Appeal in this situation, it was stated in *N.L.R.B. v. Florida Steel Corp., (Tampa Forge & Iron Div.),* (5th Cir. 1962) 308 F. 2d 931, 936:

> "However, we do not read Walton to say that the Examiner's and Board's findings as to credibility must be accepted no matter how implausible they may be. This cannot be so, since the Board can reject the Examiner's findings, [cite omitted] and this Court reviews the same cold record as the Board."
>
> *N.L.R.B. v. Florida Steel Corp. (Tampa Forge & Iron Div.,* (5th Cir. 1962) 308 F. 2d 931, 936.

As shown above, the Trial Examiner simply and plainly made errors. He stated that there was no testimony where the testimony was unusually explicit. He claimed inconsistencies, but cites no conflicting testimony. *It is extremely significant that these errors in the analysis of the transcript were the subject of explicit exceptions to the determination by the Trial Examiner, but that Petitioner has not made the slightest attempt here to rehabilitate or sustain the Trial Examiner in this regard.* By a reply brief before the Labor Board, some slight effort to do so was made, but the result was preposterous and the Court is invited to evaluate it.

Smith Was Properly Denied Reinstatement Even if He Engaged Only in the Acts of Misconduct Found by the Trial Examiner.

Cases dealing with whether an employer is justified on certain facts in refusing to re-employ a striker for misconduct are practically infinite in number, and the particular acts of misconduct passed upon occur in virtually infinite combinations. The Trial Examiner stated the test to be whether the misconduct "is so violent or of such serious character as to render the employee unfit for further service" (*N.L.R.B. v. Illinois Tool Works,* (7th Cir. 1946) 153 F. 2d 811, 815-816), or whether it merely constitutes "a trivial rough incident" occurring in "a moment of animal exuberance" *(Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.,* (1941) 312 U.S. 287, 293).

The facts in this case are as follows: The complainant was a leadman, paid a premium rate of pay to be in charge of a specific area of the plant. There

were no prior negotiations involved to raise the temper of the employees or in any way to justify a reprisal. Except for the charge herein involved, it was neither alleged nor proved that the employer had any anti-union animus. Misconduct was of such a degree that the employer refused to re-employ six employees, and though a charge was filed as to all six, a complaint was issued only as to one. Thus at most the employer is charged with having made a mistake as to a specific individual in the context of general misconduct.

Respondent submits that to direct it to reinstate the complainant in the light of the proven misconduct would create an impossible personnel problem in the plant. Complainant is supposed to supervise individuals that he has been found by the Trial Examiner to have called obscene names. He threatened and used obscene names towards other employees, including females. He interfered with vendors dealing with respondent. To permit this man back into the plant with all back pay and full status is to place a premium on misconduct. Again it should be emphasized that there was absolutely no justification for the misconduct. The complainant was engaging in misconduct when the strike was less than 24 ours old, and continued it for days.

Respondent takes strong exception to the portion of the Trial Examiner's opinion which suggests that because respondent did not discharge every employee who used profanity or obscenities, respondent may not consider such language as part of a sum total of conduct justifying discharge [R. 8, lines 35-45]. Such opinions only go to force employers to fear to achieve justice for fear of being chastised as inconsistent.

Board precedent fully supports the respondent's position. The cases are too numerous to attempt to set forth, so respondent will set only two cases out at length, and cite others reasonably analogous:

In *Brookville Grove Company,* (1955) 114 N.L.R.B. 213, *enforced sub. nom. N.L.R.B. v. Leach,* (3d Cir. 1956) 234 F. 2d 400, the employer had itself committed an unfair labor practice. Nevertheless the Labor Board upheld the employer in its refusal to rehire four strikers in the following language:

> "The Trial Examiner found that these 4 complaining strikers threatened nonstrikers with acts of violence on 2 occasions. According to testimony of management representatives which the Trial Examiner credited, about a week after the strike began, just after some strikers had returned to work, the four complainants in question, while stationed on the picket line in front of the Respondents' plant, brandished their fists and shouted to the nonstrikers, who were engaged at work inside the plant, that the strikers would 'kill' them.
>
> "About a week later, the same four strikers, while on the picket line, shouted, in substance, as employees were reporting for work at that plant, that the strikers would have help the next day and would enter the plant and throw out the nonstrikers.
>
> "While not condoning these statements, the Trial Examiner characterized them as 'idle threats not implemented in any way.' It is true that no violence occurred. However, if these threats of violence had been made by agents of a labor organiza-

tion, they would amount to conduct which, in an appropriate proceeding, might properly be viewed as violative of Section 8(b)(1)(A) of the Act. We believe that the conduct of the four complainants in question exceeded permissible bounds, and shall therefore not order reinstatement or back pay for them."

Brookville Glove Company, 114 N.L.R.B. 213, 214-215.

The Labor Board has also held that blocking, whether or not successful, is grounds for denial of reinstatement, making clear that basing the decision on whether or not the blocking is successful would be unsound policy. In *The American Tool Works Company,* (1956) 116 N.L.R.B. 1681 the Labor Board stated:

"Thus the Trial Examiner found that when Harris, a junkyard truck driver, came to the plant for a load of scrap, Hudson stepped in front of Harris' truck at the plant gate and barred its entrance during the period of time that another picket came to the side of the truck and engaged Harris in conversation. The precise nature of the conversation is not clear, but Harris, in any event, did not attempt to enter the plant. After first phoning his employer, he drove away. The record permits of no other interpretation, we believe, than that by placing himself before the truck, in the plant gate, Hudson physically and forcibly blocked entrance to the plant for the period necessary to dissuade the driver of the truck from entering. Unlike our dissenting colleague, we cannot regard such an act as divorced from all implication of a threat of physical violence. And such an implica-

tion is obviously not negated or lessened merely by virtue of the fact that the driver elected not to test the apparent threat by attempting to enter, but was soon dissuaded and turned away. Therefore, especially in view of Hudson's blocking of the plant entrance to Harris' truck, and also because of his participation, along with other employees likewise found to have been properly denied reinstatement by the Respondent, in shouting profanities through the plant windows at non-striking employees, we, as did the Trial Examiner, find that the Respondent did not, by discharging and refusing to reinstate Henry W. Hudson thereby violate the Act."

The American Tool Works Company, 116 N.L.R.B. 1681, 1682.

The following cases sustain denial of reinstatement on reasonably analogous facts:

Valley Die Cast Corp., (1961) 130 N.L.R.B. 508, 509, *enforced,* (6th Cir. 1962) 303 F.2d 64;

Waycross Machine Shop, (1959) 123 N.L.R.B. 1331, 1335, *enforced sub. nom. N.L.R.B. v. Dell,* (5th Cir. 1960) 283 F.2d 733;

The Rivoli Mills, Inc., (1953) 104 N.L.R.B. 169, 171, *enforced,* (6th Cir. 1954) 212 F.2d 792;

Intertown Corporation (Michigan), (1950) 90 N.L.R.B. 1145, 1150.

The Trial Examiner distinguished the above cases as to threats as "not apposite, since they involved threats of serious violence" [R. 7, lines 39-40]. Smith told Rakow "they were going to get [him]" [Tr. 56, lines

23-25]; he told the lunch wagon driver "you better not come back tomorrow, chicken shit" [Tr. 75, lines 4-5; 87, lines 19-20]; he shouted at nonstrikers "you son-of-a-bitch, come out here and fight like a man" [Tr. 102, 5-6]. This certainly threatens serious violence.

The Trial Examiner lightly dismissed threats, obscenities, and blocking of plant access as "rough trivial incidents" [R. 9, line 13]. How can an employer possibly put a man back in charge of 35 employees some of whom he has threatened and called names, to work next to other employees he has challenged to fights, and to deal with third party vendors whom he has threatened and blocked with a pious hope that everyone concerned think the whole thing was "trivial"? Smith, without provocation of any sort, put himself in a position such that it is absolutely impossible to put him back to work.

Looking at the entire case, the position of Petitioner here is completely inconsistent. It suggests on one hand that Respondent refused to reinstate Smith because he was the leader of the strike. Smith's defense to the charges of misconduct, however is that he was not even present on most of the occasions. For example, he testified that most of the employees went back to the plant the second day, but he went home [Tr. 20, lines 9-14]. He testified he was only intermittently present on the picket line at the commencement of work [Tr. 34, lines 13-22]. Thus the Labor Board is saying for the purposes of determining our motivation, Smith was the leader but for the purposes of determining Smith's participation in misconduct, he was not even present.

Conclusion.

Wherefore, Respondent respectfully submits that this Court should deny enforcement of the decision of the National Labor Relations Board.

Respectfully submitted,

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By HUGH J. SCALLON,
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Dated July 11, 1968

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HUGH J. SCALLON